Imam Muhammad Shirazi

The rights of prisoners according to Islamic teachings

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fountain books
BM Box 8545
London WC1N 3XX
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www.fountainbooks.com

In association with
Imam Shirazi World Foundation
1220 L. Street N.W. Suite # 100 – 333
Washington, D.C. 20005 – 4018
U.S.A.
www.ImamShirazi.com

Second English edition, 2002
Third English edition, 2003

ISBN 1-903323-07-X

British Library Cataloguing in Publication Data.

A catalogue record for this book is available from the British Library.

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Foreword

As a complete system of teaching for life, Islam addresses every aspect of life to guide mankind to the best possible solution in every respect. Islam addresses issues of concern for this life and beyond. Although the teachings of Islam are devised to prepare mankind for the eternal life of the hereafter, it does not neglect man's need for guidance during the brief cycle of life in this world. Islam presents detailed teachings or general guidance for man that is in harmony with his nature, at various stages of his life, and for every situation that he come across.

On the issue of prison and a prisoner's right therefore, Islam has its own philosophy with regard to the question of imprisonment and the prison system. In general, Islam considers imprisonment as a case of last resort, and in many circumstances imprisonment is not used as a punishment. However, there are a number of offences for which imprisonment has been prescribed.

Any chastisement prescribed by Islamic teachings may only be implemented if all the criteria and preconditions prescribed by those teachings are also met. If any of the criteria is not met, then the prescribed punishment may not be executed. In that condition a judge would consider a lesser punishment to reprimand the offender, as seen fit. For example, the prescribed punishment for theft could ultimately be amputation of parts of the fingers. However, the author, the most eminent authority on Islam in recent times, cites more than forty conditions, all of which must be met simultaneously, if this punishment were to be carried out; a requirement that is practically almost impossible to meet today. One of these criteria is that a true Islamic system of government has been implemented in all aspects of life and society, politics and economics, etc. Failing that, Islamic teachings indicate, the prescribed punishment may never be carried out, and a lesser deterrent, if at all, may be considered. Today therefore, when none of the Muslim countries around the world has implemented a true Islamic system of government, this punishment, or any other punishment prescribed by Islam, may not be executed for such reasons as the above-mentioned.

On the issue of imprisonment and related matters, in the first chapter of this book the author addresses the fundamental nature of freedom, and henceforth highlights the harmful effects of imprisonment on the individual concerned, and consequently on the community as a whole.

The author then goes on to discuss in some details the disadvantages of imprisonments and its harmful effects, and therefore the need to reduce the number of prisoners to a minimum, and eventually to eliminate prisons altogether. In this chapter the author also outlines some of the offences that would lead to imprisonment under an Islamic system, and cites cases to demonstrate the attitude and role the Islamic ruler should have towards offence; that is to try to identify issues, or circumstances that would allow him to waive the punishments in any particular case.

In the second chapter, the author addresses the issue of torture in general, and the mental and physical ill treatment that a prisoner is subjected to while in detention under the pretext of interrogation and extracting confession from a detainee or a suspect. Not only such a confession is totally invalid in an Islamic court of law, but the author decrees that even a wilful confession to be invalid if that confession is made while in detention.

In the third chapter, the author discusses in some detail, the issue of the Islamic penal code, its categories, and in particular the pre-conditions and the criteria that must be met, before any Islamic punishment may be executed in accordance with the Shari‘ah.

In the fourth chapter of the book, the author addresses the issue of the rights of a prisoner, and his freedom to engage in various activities ranging from commercial activities to intellectual projects.

In the final chapter of this work, a number of *Fatwa* or Islamic rulings are included concerning imprisonment, detention, torture, and the validity of a confession of a suspect.

This work would be of particular interest to those who are associated or involved with prisoners and prisons in general. Human rights activists would also find this work of particular interest.

Z. Olyabek

September 2002

Chapter 1: Freedom – a fundamental principle[1]

Freedom is a fundamental principle in mankind, and therefore a suspect may under no circumstances be detained before conviction, except in cases where the probability of harm to the individual concerned would be greater than that of detention. In such circumstances it is permissible to detain the individual on the basis of priority of the urgent issues involved, and it is established that 'urgent issues' are evaluated on their merits . . . On the same basis it is permitted to 'imprison' the suspect to protect him from the mob, that is, if in an emergency situation it becomes necessary to protect the life of the suspect, it is permitted to imprison him – for a specific period, if this proves to be the only option. This (permission) is based on the principle of priorities, which is referred to by reported hadith as well as the jurisprudential discussions presented by the author in relevant publications. Some of the reported hadith in this respect is outlined below:

Al-Sakouni narrates from Imam Saadiq (A),

"The Prophet (S) used to detain a murder suspect for six days, if the guardians of the victim produced evidence of murder (the detainee would be prosecuted), otherwise the detainee would be released."[2]

Imam Ali (A) is reported as saying;

"No detention for suspicion except for blood (i.e. murder), and detention after the truth has become known (about the innocence of the suspect) is oppression."[3]

Imam Ali (A) is reported as saying,

"I do not apprehend on (the basis of) accusation, and do not punish on (the basis of) suspicion, and I do not fight except he who fights me."[4]

On the case of the insurgency of Khrit bin Rashid, from the tribe of Bani Najiyah, against Imam Ali (A), Abdullah bin Qa'een protested to Imam Ali (A) as to why he did not seek to detain him, saying "O Amir-ul-Mu'minin why do you not detain him now?" He (A) replied "If we were

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[1] This chapter is taken from the author's *al-Fiqh* series, volume 101, *"The Islamic Government"*, pp 197-203.

[2] *Al-Kafi*, vol. 7, p 370

[3] *Da'a'em al-Islam*, vol. 2, p 539

[4] *Al-Gharat*, p 251

to do that to anyone (who is accused or suspected), the prisons would fill up with such people, and I do not see it in me that I could attack, detain, or punish them unless they wage war against us (who would be dealt with accordingly).[5]

It is imperative that imprisonment, bar the exceptional circumstances as defined in Islam, must be avoided by all means, for the substantial harm it entails:

- Economic harm; in this aspect, the prisoner stops his normal occupational activity and his expenses must be met by the treasury, which is that of the people. In addition there is the added cost of running the prison and its staff. Therefore the economic cost of imprisoning an individual is three fold; one the cost of stopping his labour/occupational activity, two the cost of his maintenance during his imprisonment, and three the cost of running the prison system.
- Educational harm; where the prisoner is prevented from the education he would – normally – receive if he were free.
- Political harm; where he would not – normally – be able to take part in the political maturity, either for himself or for others.
- Social harm; where his family may end up being displaced, which in turn causes even more social harm.
- Personal moral harm; where the individual normally develops (various) complexes, which will be reflected within the prison and without.
- Family moral harm; where his imprisonment could lead to the detriment of family moral values – the wife and the children – in the absence of its breadwinner.
- Construction harm; when the builder or the civil engineer is imprisoned.
- Health harm; when a physician or other medical workers are imprisoned.
- Crime harm; where the criminal prisoner teaches the tricks of his trade to other prisoners, such that when a prisoner leaves the

[5] *Al-Gharat*, p 223

prison he would disseminate his newly acquired knowledge across the society at large.

- Other harms; such as the destruction of the sense of responsibility in the prisoner. For one usually feels the restrain and the gravity of committing an offence, and if he were imprisoned, he would know that people would see him as an offender and a criminal, and this would reduce the gravity of committing an offence, and would gradually not see himself as responsible, etc.

Furthermore, it is imperative for one who is being imprisoned or punished, that he and his family are not exposed unnecessarily, or more than that specified in the Islamic law, for a Muslim may not be insulted, degraded, terrorised or humiliated, all of which are outside the bounds of Islamic Shari'ah. There are no grounds for exceeding the specified punishment framework. For example if a woman committed adultery and she admitted to that, or it was clearly proven according to Shari'ah criteria[6], if it were declared that she belonged to certain (reputable) family and the execution of the prescribed punishment would mean the loss of honour of the family in the eyes of the society, then the punishment may not be carried out. And this is applicable to all offences.

[More details about the harms of imprisonment in the following chapter.]

For these reasons it is against Islamic law to publish or expose one's secrets of private life through the mass media, such as radio, TV, press and such like, particularly if one was coerced to admit something, which is illegal in two ways.

It is reported from Imam Ali (A)

"He who exposes the secret or privacy of his brother, the scandals of his household would be exposed."[7]

Also reported from Imam Ali (A)

"The most evil of the people is he who does not forgive the fault of others and does not keep their secret."[8]

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[6] Adultery can only proven if one comes forward and freely admits it – three times, or if the act is witnessed by four adult witnesses.

[7] *Kashf al-Ghummah,* vol. 2, p 157, *Majmou'at-Waram,* vol. 2, p 39, *Tuhaful-'Oquol,* pp 88 & 93, *Bihar al-Anwar,* vol. 72, p 321

Prophet Muhammad (S) said,

"Do not pursue the faults of the Muslims, for he who pursues the faults of the Muslims, Allah would pursue his faults, and he who is pursued by Allah, (surely) would be scandalised."[9]

Prophet Muhammad (S) is also quoted as saying,

"Allah Almighty has said, "He has opposed me who degrades my faithful servant.""[10]

It is preferred for the offender himself, as well as he who witnesses the offence not to expose the event if possible, unless there is other more important priorities involved.

Imam Saadiq (A) is reported as saying,

"A man came to Prophet Muhammad (S) and said 'I have committed adultery', ... then the Prophet (S) said "if he had kept quiet about it and had repented (to Allah sincerely), it would have been better for him.""[11]

In another report, a man came to Imam Ali (A) and said, *'O Amir-ul-Mu'minin! I have committed adultery, so purify me.'* Imam Ali (A) turned his face away from him, and told the man to sit down. Imam Ali (A) then turned to the people (who were sitting around him) and said, *"Is any of you incapable to shield upon himself, just as Allah has concealed upon him?"* The man got up and said, *'O Amir-ul-Mu'minin! I have committed adultery, so purify me.'* Imam Ali (A) said, *"What makes you say this?"* The man replied, *'(I am) seeking purification (from this sin).'* Imam Ali (A) said, *"And what is a better purification than repentance?"* Imam Ali (A) then turned to his companions to talk to them when the man got up and said, *'O Amir-ul-Mu'minin! I have committed adultery, so purify me.'* Imam Ali (A) asked the man, *"Do you not read the Qur'an?"* He said *'yes'*. The Imam said, *"Read",* and the man read the Qur'an correctly. The Imam (A) asked the man if he knew his obligations towards Allah in terms of prayers and alms. He said *'yes'*.

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[8] *Ghurar al-Hikam wa Dorar al-Kalam,* p 245. This book is a collection of the sayings of the first successor of the Prophet Muhammad (S) as appointed by the prophet on specific instructions from Allah Almighty, Imam Ali (A).

[9] *Al-Kafi,* vol. 2, p 355, hadith 4

[10] *Al-Kafi,* vol. 2, p 351, hadith 6

[11] *Al-Tahdheeb,* vol. 10, p 8, hadith 22

The Imam (A) asked him a few questions to which he replied correctly. Imam Ali (A) then asked him if he suffered from any illness, or ache in his head or pain in his body, or if he has any anxiety. The man replied negative. Imam Ali (A) then said to him,

"Woe unto you! Go away until we ask others about you (to seek their impression of you), just as we interrogated you in public, for if you do not come back to us, we would not pursue you.[12]"

In another case, it is reported that a man came to Imam Ali (A) and admitted four times that he had committed adultery. The Imam (A) said to (his assistant) Qanbar to keep the man, and angrily said,

"How repulsive it is for any of you to come forward with some of these indecent acts, exposing himself in public. Why could one not repent in his house? By Allah, if he were to sincerely repent, between himself and Allah, that would have been better than I execute the Hadd upon him."[13]

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[12] In this hadith Imam Ali (A) is telling the man that the essence is that if one committed a sin, one should regret that, repent, and seek forgiveness from Allah Almighty, and now that Allah has kept that sin a secret, do not publicise it and at the same time sincerely repent to Allah. Imam Ali (A) is telling the man that if he has an honourable reputation in the society, i.e. not known for indulging in sinful acts, then the Imam would not seek to publicise his sins and jeopardise his dignity if the man repents from his deed. *'Man La Yahdharah-ul-Faqih',* vol. 4, page 31, section 2, hadith # 5017.

[13] *Al-Kafi,* vol. 7, p 188, hadith 3

Chapter 2: Torture and prisons must be purged[14]

Any kind of torture, and however it may be justified, is prohibited and unequivocally Haram – i.e. unlawful, for Allah has not revealed any evidence to permit this act at all. Therefore it is imperative that torture is avoided at all costs, even towards the enemy.

For he who humiliates an individual will not be able to defend and uphold the dignity of mankind, and he who practices torture, even once, and yet claims he wants to lead mankind to dignity, his claim is nothing but absurd and nonsense. For he not only will not attain such aim, but will stand as a criminal before Allah Almighty, and will loose all dignity and credibility in society. There are those who think that if they commit this heinous act, they will go unnoticed, forgetting Allah's promise

{And say: Work, for Allah will observe your work, and His Messenger, and the Believers: and you will be brought back to the Knower of the unseen and the seen, then will He show you the truth of what you did.}[15]

Torture is an un-Islamic phenomenon

Undoubtedly it is possible to arrive at the truth without resorting to torture, but through careful investigation of all available evidence, as well as detailed questioning, as seen in many cases dealt with by the well known judicial judgements of Amir-ul-Mu'minin Imam Ali (A)[16].

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[14] This chapter is taken from the author's book "The Dynamics of Change for the Salvation of Muslims" pp 136-152. The book is addressed to Muslim reformists and activists who aspire to establish some form of Islamic government in their homeland. Imam Shirazi emphasises that such groups must resolutely adhere to the teachings of Islam, whether before they reach government or after assume office of government. In accordance with Islam, Imam Shirazi in this work calls upon Muslims to refrain from violence and adopt peaceful and non-violent means in all aspects of their conducts and activities, within their group and without, towards their fellow members, or towards the general public at large, and even towards their enemies. This work constitutes a "Book of Conducts" for Islamist political movements.

[15] The Holy Qur'an: Repentance (9): 105.

[16] Many scholars have written specific books about the judicial judgement of Amir-ul-Mu'minin (A) or have allocated significant sections of their books about this issue. Some of the books are *Bihar al-Anwar;* by al-Majlisi, *Ma'adin al-Jawahir;* by Ibn Abil-Hadid, *Madinat-ul-Ma'ajiz;* by al-Bahrani, etc. The first person to write about this topic is Obaydullah ibn Abi Rafi', secretary of Amir-ul-Mu'minin Imam Ali (A) during his entire reign. Ibn Abi Rafi' is the first who wrote about the battles, skirmishes and excursions, and he died in 100 Hijra, and the title of his book is *"Judgements of Amir-ul-Mu'minin (A)".* Another book in this respect is *"The Judgement of Amir-ul-Mu'minin (A)"* by Sheikh

It may be argued if torture is not exercised against the criminals, they would not admit the truth, and therefore some of the truth will remain hidden, as claimed by despots.

The counter argument is that, first it is better for some of the truth to remain hidden than to violate the human rights of the individual through torture. Secondly, even with torture some of the truth still remains hidden, for some of those tortured, falsely admit to things they have not done to alleviate the torment of torture, which is also hiding the truth!

Means of discovering the truth

There are various approaches and strategies that may be adopted to uncover the truth without resorting to torture, despite the complexity of the cases involved. Arriving at the truth through permissible and scientific means is possible although it takes time and expertise for this to be achieved.

Psychoanalysis

A body was discovered in the city of Isfahan, during the governorship of *Hujjatul-Islam Muhammad Baqir al-Shefti.* He explored various avenues to identify the murderer but to no avail. He eventually called upon the services of an experienced psychoanalyst, who examined the corpse thoroughly. He then ordered all the butchers (of the city) to a gathering in the presence of the governor, and in that gathering he asked them to line up such that their backs are to the governor. In the end, he told the butchers, "You can go now." As they began to walk away, he said, "You! The murderer, where are you going?" at this moment suddenly one of them unconsciously turned back. The expert ordered him to be detained, and when after questioning, it became apparent that he was the murderer. Afterwards when the psychoanalyst was asked how he arrived at his conclusion, he said that when he examined the corpse, he noticed traces on the clothing of the deceased, which were indicative of the murderer wiping clean the murder knife, and this is the practice of the butchers when they slaughter a sheep, they wipe clean their knife on the wool of the animal. The murderer is aware of his crime but he suppresses his conscience to keep it hidden, however occasionally the crime is revealed through a slip of an action if he is caught unawares. Imam Ali (A) is reported as saying;

Muhammad Taqi Kadhem al-Tustari, 1321-1410 H, and also the book *"Astonishing Judgements"* by Ibn Abil-Hadid al-Mo'tazili.

"An individual does not intend something unless it shows in the expressions of his face, or in the slips of his tongue."[17]

The rule of repetition and doubt

It is also reported from the reign of governor al-Shefti, that a woman complained to him that "one of the well-known and influential individuals has managed to usurp (my) orchard that is adjacent to his orchard, and as he has the influence and the money, he has made many people to act as witness that the orchard is his, and all of this was done in my absence. Now that I have found out about this, I do not seem to have evidence to counter his, to prove that the orchard is mine. Do you think you could do something for me?"

After he satisfied himself of her honesty, governor al-Shefti decided to pursue the matter further. He first approached the individual concerned and said to him that this woman claims the orchard is hers, what do you have to say in this matter? The man refuted the allegation and presented the papers to prove the property belonged to him, along with the signatures of numerous witnesses testifying to that effect. The governor noted the evidence and discharged him.

After a while the governor asked that man "For how much did you buy the orchard?" and the man replied, "I did not buy the property." . . .

Some time later the governor asked the man "Who gave you this orchard?" and the man replied, "Nobody gave me it."

On yet another occasion the governor asked the man "Did you inherit it from your father or from someone else?" and the man replied negative.

In this way and on different occasions the governor continued to ask the man questions about how came to possess the property, and on each occasion the man answered negatively without realising the consequences of his replies. The set of questions the governor had asked and the set of answers the man had given proved that he was not the rightful owner of the property. The governor then turned to the man said "You denied all possible ways of owning the orchard, so how did you come acquire this orchard?" The man tried to justify his actions but failed to present a viable case for his claim, and given the replies he had previously given, it became apparent that the documents and the witnesses were all false. The governor

[17] *Nahj–al–Balaghah,* Short Words of Wisdom; 526

then ordered the documents to be destroyed, and decreed that the orchard belongs to the woman unless someone else could prove otherwise.

Twist and Turn

On the method of investigations by one of the judges, it is reported that a man came to the judge and said to him, "a friend and I owned some money that we buried in the vicinity of tree outside the town for safe keeping. After a while I needed the money and my friend and I went to the location to excavate the money, but there was no trace of any money in the place that we had buried it. I strongly believe that my friend had taken the money, since no one else knows about the money we had buried there." The judge asked the man if he had any witness or proof for his claim. The man replied "No. Except that no one else knows about this."

The judge summoned the friend and asked him about the money and the tree, he denied all knowledge about them.

The judge then asked the friend to remain there for a while to which he obliged. The judge then asked the claimant to go to the tree near which the money was buried and check again. The man said, "What is the use of this action?" The judge said, "Perhaps the man who had taken the money changed his mind and brought the money back or you might find him there, and take the money from him." The man was not satisfied with the idea, but did what the judge had asked him to do. A while after the claimant had left the judge said to the friend, "It seems that your friend is taking too long." The friend said, "no he is not." The judge asked "Why not?" the friend said, "Since the tree is too far out from town." The judge then turned to the friend and said, "You have now admitted you know where the tree is . . . you must now bring forth the money which you had taken dishonestly." The man had no choice but to give the money to the judge as he inadvertently admitted the whereabouts of the tree.

When the claimant returned, the judge told him, "The only reason I asked you to go to the location of the tree was to give me an opportunity to question him again and extract the admission from him, and my idea worked as I planned, and here is your money."

Probing and examination

It is reported that a man came to 'Adhdu-Dawlah al-Buwayhi, and complained to him saying, I buried some money under a tree outside the city of Baghdad, and no one saw me doing this. When I returned back to the location to retrieve the money, there was no trace of it.

Al-Buwayhi asked the man, “do you know what kind of tree it was?”

The man said, “Yes, it was castor-oil tree.”

Al-Buwayhi then summoned the physicians in Baghdad and asked them if anyone had prescribed roots of castor-oil plant to any of his patients. One of them said he had done so. Al-Buwayhi asked the physician if he knew the patient he prescribed the roots. The physician said the patient was one of the governer’s ministers. Al-Buwayhi summoned the minister concerned and asked if he had been prescribed castor-oil roots by the physician. The minister confirmed this and when asked how he obtained the root, he replied that his servant had acquired it for him. Al-Buwayhi asked for the servant to be summoned.

Al-Buwayhi: “Did you obtain castor-oil roots for the minister?”

Servant: “Yes, I did.”

Al-Buwayhi: “Where did you get it from?”

Servant: “from a tree in countryside”

Al-Buwayhi: “What is the location of the tree?”

The servant gave the precise location of the tree and it became apparent that they were talking about the same tree. In this way the servant admitted to digging under the tree without him realising, and indirectly admitted to taking the money.

Al-Buwayhi said to the servant that you should return the buried money you found under the tree while you were digging for the roots of the tree. When all the evidence was out in the open the servant had no choice but to give back the money, except what had already been spent, which the owner forgave. In this way Al-Buwayhi managed to unravel the details of that complicated case in the calm and clever way.

Insight and Astuteness

In another case for ‘Adhdu-Dawlah al-Buwayhi, a businessman came to him with a complaint. He said to him “I wanted to go to the Hajj pilgrimage and I had some one thousand gold Dinars to spare, and for safe keeping I deposited the money with one of the businessmen and left for Hajj. When I came back from Hajj I asked for the money I had deposited with him, but he denied all knowledge of this.

Al-Buwayhi said to the man, “All you need to do is go and stand in front of his shop such that he can see you. I shall arrange for my cortege to pass through that road and when I see you I shall warmly welcome you and ask

you to come with me to my house, but refuse, and say you have other business to attend to."

On the following day the businessman went and stood opposite the shop of the other businessman and while the other businessman protested him standing there, he ignored him. At this moment the royal cortege arrived and when he saw the man standing there, Al-Buwayhi got off and warmly welcome him back and asked him to join him in his cortege, but he refused. Al-Buwayhi insisted that he come to his house but, as planned, the man refused the offer. Al-Buwayhi asked the man if he needed any help, but the man replied negative. After Al-Buwayhi left the scene, the businessman who had seen what went on between the two came forward and said to the man standing outside his shop, "can you remind me what was the sign of your deposit, since I have forgotten what it was? "

In this way al-Buwayhi managed to help retrieve the man's money from the other (without resorting to brute force or violent means). Needless to say there are countless cases in this respect reported in relevant books, and we only referred to a few of these for the benefit of the reader.

We mentioned in the books *al-Hudood*[18] and *al-Qadhaa'*[19] the absolute illegality of torture, and that under no circumstances does it exist in the Islamic system of government. We also mentioned there some of the reported cases and the response and conduct of Prophet Muhammad (S).

One should not think that he could base his approach of uncovering the truth on torture, and then denounce torture when it suits him.

Exposing torture and ill treatment

It is imperative to expose torture and any form of ill treatment in detention.

This may be achieved through the publication of millions of books, and through all the various means.

For torture in prisons, which has become widespread in the prisons of the Muslim world, in an Islamic country or otherwise, is a despicable and abhorrent act and must not be allowed to continue.

Torture weakens the determination and the will of the people to topple the despot ruling their country. Imprisonment may not have as much of an effect as torture, people may tolerate imprisonment but not torture,

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[18] M. Shirazi, a*l-Fiqh* series, volumes 87-88.

[19] M. Shirazi, a*l-Fiqh* series, volumes 84-85.

whether physical or mental has detrimental effect on them. This is why many colonial governments, such as Britain, USA, France, Russia, and China, as well as their puppets ruling other countries used torture in order to hold a tight grip on power in Muslim countries. It is therefore imperative that the Muslims expose the practice of torture in their countries so that this may lead to salvation of the Muslims and their countries. When the government of Gamal Abdul-Nasser fell, the Muslims in Egypt made a limited effort to expose the routine use of torture by his regime, which in turn led to the demise of the notion of nationalism – which was instigated by him – in Egypt as well as in all other Arab countries; the fall of his regime was like that of the tyrannical regime of the Umayyad dynasty, which fell thirteen centuries ago and its reputation never recovered. In this way means of holding on to power must be removed from the hands of a tyrant ruler. Although torture is still practiced in Egypt, it is to a lesser extent than that which leads to Nasser's disgrace.

No to prisons and detention centres

Just as it is absolutely imperative upon reformists to refrain from torture, it is equally imperative to reduce prisons and prisoners numbers to the least amount possible, since not only is it suppression of freedom of the individuals, it is also illegal in the Islamic Shari'ah, for prison is a prime example of manifestation of suppression of freedom.

It is not rational that one who calls for Islam, would act in opposition to Islam on one of its important rulings. Furthermore, prison entails much damage and harm (to the society) for which nothing can compensate, and one may not resort to it except for the most urgent exceptional circumstances, and given the priority of the issue involved. In those cases, the following must be noted:

1. The number of days imprisoned,
2. The reason for imprisonment
3. The severity of imprisonment
4. The continuation of imprisonment

Who is imprisoned in Islam

We reported in some of our investigations in the *Fiqh*[20] that those who are imprisoned in Islam are not more than twenty cases[21], all of whom had

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[20] M. Shirazi, a*l-Fiqh* series, volume 100, *The Rights*, pp 348 - 354.

committed 'real' crime, and not crime as defined by man-made laws. Needless to say that more than ninety percent of those who are imprisoned in our world today, are sent to jail for violating laws which were laid down by a despot, or by his ministers, or by his revolutionary command council, or in the best case scenario, by freely elected parliament – the like of which does not exist in the Islamic world today. Therefore most of those imprisoned today must not be punished according to Islamic teachings, as Islam does not see their acts as crime. In other words they are criminals before the law of man and not necessarily before the law of God. Needless to say that there have been many occasions when the law devised by freely elected parliaments were later shown to be against the general interest of future generations, and therefore revised or abandoned.

As for the nature of prisons at the time of leaders of Islam, it is reported that Imam Ali (A) used to construct the prison from the leafless branches of palm tree, were it not for the prisoners managing to escape from their cells, the prison construction would have stayed the same.

The disadvantages of prisons

The harm and the damages of imprisonment can be seen in various domains; such as political, social, economic, educational, health, etc.

Political Harm

Imprisonment causes psychological complexes for the prisoner, which in turn brings about his hatred towards the people and the state.

As for the state, he would regard it as an oppressive and tyrannical force, and on this basis he would act to destroy anything that is associated with it and bring about its downfall.

As for the people, a complex-driven individual would dislike all the people since he considers them as having failed to help him, for it is rare that a criminal considers himself of being guilty. For example a thief considers himself as being forced to steal since he did not have enough money to live on, whereas he see the rich steal the money of the poor through phoney laws.

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[21] Such as the Usurper of others' property, he who betrays something given to him in trust for safe keeping by denying it, negligent physicians, he who does not pay for his wife's expenses, giving false alibi.

Other political disadvantages of imprisonment are: some of the prisoners would train others in crime, corruption, mischief, etc. since, given the extra time they have in prison, each will convey their experience in crimes to other prisoners, and this is seen in most prisons throughout the world.

Social Harm

As for social harm, they are numerous too:

1. the prisoner thinks that he has fallen from the community, and that society has expelled him, and for such reasons he turns against society in all his conducts, and therefore he turns from being a useful member of society to a harmful one.
2. imprisonment of the head of a family is not without effect on the family, for the family is affected socially, materially and psychologically, and may fall from being dignified members of society.
3. both sides of the family may suffer from or fall into immoral conducts concerning sexual matters. The prisoner has his own sexual needs and consequently, may fall into practicing homosexual acts. As for the family of prisoner, they too may engage in immoral sexual practices to satisfy their sexual needs, if not to earn means of living.

Economic Harm

As for economic harm, this is caused by the inability of the prisoner to engage in his normal occupation to earn his living. Not only has he not earned the money he usually generates, but the family loses that income too, which in turn lead the family to poverty and its dire consequences.

We have in a hadith, *"Poverty is a shame in both worlds'*[22]

And it is reported that Abu Tharr al-Ghifari[23] said, *"it bewilders me how the poor do not revolt against the rich with their swords."*

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[22] i.e. in this world and in the hereafter. *Bihar al-Anwar,* vol. 69, p 30

[23] Abu Dharr al-Ghefari was one of the most prominent and loyal companions of Prophet Muhammad *salla-llahu-alayhi-wa-aalih*, who was known for his sincerity and honesty. After the death of the Prophet, he also became known for his brave criticism of wrong actions or policies of the government, and for his standing up to tyrant and despot rulers of his time.

Educational Harm

In this respect, the prisoner could potentially be denied the opportunity to continue his studies and graduate from university. The consequences of this is two fold; first it causes his failure in society, where he sees his colleagues have successfully managed to graduate from universities, which in turn could bring about his hatred towards society, and therefore create his desire to seek revenge from it. Secondly it brings down the general level of education in society, and enhances ignorance and immorality in the society.

Health Harm

As for health harm, this is as a result of the anxieties and psychological complexes that he may develop, for they develop into physical and mental illnesses, and it is proven that mental illness could lead to physical illness and vice versa. Other examples of health harm are

- the anger a prisoner creates amongst his relatives when they see his state, depression, and anxieties,
- the problems caused amongst the prisoners themselves, since they become more irritable when they lose hope of life and aspiration,
- the spread of drug abuse inside prisons, and its consequences,
- the spread of gambling inside the prison, since they have much time to kill, causing further anxiety, and hatred.

Other harmful effects of imprisonment

Imprisonment could cause other personal and social harms that are interlinked to each other. For example since a significant majority of the prison inmates are young, a generation will be brought up with violence, crime, corruption and this could be very damaging to society as a whole. There are also administrative and financial costs to imprisonment such as:

- the time, money, and effort wasted in managing a prison system,
- the inflation of government's bureaucracy for managing it,
- the fact that most of those who go to prison are from the poor, since the rich, firstly do not usually need to engage in such criminal activities such as theft, and secondly, if they are sentenced to a prison sentence, they usually manage to buy their way out of prison. Therefore the prison is an additional means of oppression upon the

poor; for the society brought about his poverty in the first place and then imprisoned him!

In addition to the harms of prison cited above, there is the time wasted by the relatives of the prisoner to visit him and the effort involved in this process, whereas they could spend that time and effort for the good of the community. Of course the list for the harmful consequences goes on, which would make a massive book if we were to go into details.

Therefore all such issues must be taken into account when considering the need for imprisonment, and the latter should only be taken up when in absolute emergency and no better alternative is available.

Chapter 3: Islamic penal law – criteria for implementation

Introduction[24]

It is the responsibility of society that anyone who suffers from any illness, physical or mental, receives the required treatment, even if the individual concerned caused his own illness. Equally, it is the responsibility of society (towards a criminal) to rehabilitate him.

Therefore any punishment must be based upon two related issues:

- Protecting society from the reoccurrence of crime,
- Rehabilitating the criminal as far as possible.

Muslims use the laws that are based on Islamic teachings, and they may not make laws that are in contradiction to those teachings. The Muslim judge may therefore legislate within the framework of Islamic teachings. The judge may prescribe the punishments for those offences that have not specifically been outlined in Islamic Shari'ah. He may prescribe the penalties for offences relating to 'secondary' laws, such as traffic regulations. [These regulations are implemented on the basis of the principle "no harm may reach anyone"[25]]. Also a judge may, for example, prescribe the penalties for the employee who is in breach of his employment contract.

According to Islamic law, punishment may be classified into two groups:

1. Those defined by Islamic law, known as *Hadd* [plural *Hodud*].[26]

2. Those not specifically defined by Islamic law. This category of punishment is referred to as *Ta'zir*. A judge may prescribe the *Ta'zir* punishment either for offences for which no specific punishment has been prescribed in Islamic law (such as defrauding, e.g. giving short measure), or for secondary offences such as traffic law violation. The

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[24] This chapter is taken from the author's *al-Fiqh* series, vol. 100, book of "Rights", pp 454-476.

[25] This principle is based on the Prophet Muhammad statement: *"No (one may) harm nor (be) harmed in Islam."* See *Man la Yahdharuh-ul-Faqih,* vol. 4, p 224.

[26] The author has mentioned, in his books on jurisprudence that the head of state (of an Islamic state who is a *Marje'* or religious authority) has the authority to waive such punishment if it is prudent to do so. See the book of *Hodud & Ta'zirat*, volumes 87-88 of the *al-Fiqh* series, and *the Islamic system of government* by the author.

prescription of the *Ta'zir* punishment is made on the basis of the criteria detailed in Islamic law.

The author has detailed in some other of his works[27] that those acts that are defined as 'offences' under Islamic law are far less than those defined under man-made law found in western democracies. The ratio is 1 to 100 or even less. This is because of the vast number of freedoms that are naturally available under Islamic law (but are suppressed under man-made laws). Only those acts are punishable if they are recognised as offences under Islamic law. Furthermore, Islamic punishment for 'recognised' offences can only be implemented under an Islamic system, as discussed in the book "The Process of Change."[28] Otherwise how can a thief be expected not to steal when he is hungry and cannot find the means of feeding himself? Or how can one who commits illegal sex be expected not to do so when he cannot afford to marry? Allah states in the Qur'an:

{On no soul does Allah place a burden greater than it can bear.} [29]

{Allah puts no burden on any person beyond what He has given him.}[30]

{Our Lord! Lay not on us a burden greater than we have strength to bear.}[31]

Therefore as far as the offences that take place under non-Islamic environments are concerned; no punishment may be carried for some of them, [and some form of punishment, lesser than the prescribed ones – *Hadd* – may be handed down for others]. An example of the first category is the case of stealing and eating others' food during a famine. Another example is the case of the woman who was impelled to commit adultery. [In the case of the second category,] offences may carry some form of preventative punishment as seen fit by the judge. This is in cases where an individual had the opportunity to refrain from committing an offence, or could have committed a lesser offence when he was compelled to do so in a given situation.

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27 M. Shirazi, *"The New Order for the World of Faith, Freedom, Prosperity & Peace"*, and *"We want it an Islamic government"*.

28 Under an Islamic system of government and environment, one is given all the possible opportunities to attain one's goals and aspirations, and therefore one would not usually be in a position to need to commit crime or any illegal act.

29 The Holy Qur'an: The Cow (2): 286.

30 The Holy Qur'an: Divorce (65): 7.

31 The Holy Qur'an: The Cow (2): 286.

Under an Islamic system, the government provides the Islamic freedoms such as those in agriculture, manufacturing, trade, education, and freedom in procuring and utilising the earth and its resources. Under such a system, one is able to earn his living honourably. He is able to provide food and shelter for himself. He is able to marry and provide for his family. Those who are unable to provide for themselves are supported by the public fund. The (social) environment upholds the moral and ethical conducts and does not corrupt the individual through encouraging seduction and promiscuity, consumption of alcohol, broadcasting sex programs, etc. (hence) luring the individual to corruption in various forms. Workers earn decent levels of income and their rights are not violated. The environment should not be such that workers are forced to work day and night only to get less than their right, as detailed in the book, Economics.[32] It is under such a system, which is positive in one way and negative in another (i.e. the freedom of many rights and the denial of some others), that the religious law considers the thief guilty. It considers those who gamble, commit adultery as offenders. They will then be dealt with according to the prescribed punishments.

However, if the law of the land legalises the production, sale and serving of alcohol, prostitution, homosexuality, and other immoral conducts, then those who engage in such conducts may not be prosecuted under Islamic law. If one is unable to earn a living and subsequently resorts to either stealing or other immoral means of earning, such as prostitution, in such cases Islamic punishment may not be carried out. Otherwise it will be against the teachings of the Qur'an, the *Sunnah*[33], the consensus of the scholars, and reason:

The Holy Qur'an states ***{except under compulsion of necessity}***[34].

The Prophet Muhammad (S) is quoted as saying; *"(in) nine cases my people would be excused."*[35]

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[32] M. Shirazi, *al-Fiqh* series, volumes 107-108, Economics.

[33] Sunnah meaning the teachings and traditions of the holy Prophet Muhammad *salla-llahu-alayhi-wa-aalih (S),* meaning Allah's peace and blessings be upon him and his pure progeny. It is a mark of piety and devotion in Islam to use this salutation when mentioning the name of the holy Prophet Muhammad.

[34] The Holy Qur'an: The Livestock (6): 119.

[35] (These are when they:) make a mistake, forget, do not know, cannot bear, are forced (by circumstances), were coerced (by others), (expectation of) bad omen, devilish insinuation when thinking about existence and creation, and envy, if it does not manifest in the tongue or hand." See *al-Khisal,* p 417; *al-Kafi,* vol. 2, p 463, and *al-Wasa'el,* vol. 11, p 295.

Doesn't the consensus of the scholars agree with this? Doesn't reason point to the necessity of the duties and obligations being humane? In addition to the general principles which makes it evident that Islam is a religion or a "set of teachings" to facilitate and make life easy for mankind, Allah states, ***{Allah intends every facility for you. He does not want to put you to difficulties.}*** [36]

Imam Sadiq *alayhis-salam* states, *"Our followers are in a greater opportunity (facility) than what is between the heaven and the earth."*[37]

However, the conduct of the ignorant and the greedy individuals in power reduces and narrows down, if not eliminates, the opportunities available to mankind. The contradictions of those who claim to be Islamic governments may be as follows:

- under repressive and un-Islamic laws, and in inappropriate environments (from the Islamic point of view) they implement the punishments prescribed for a truly Islamic system[38]. This (policy) presents Islam as a repulsive executioner, which drives people away from Islam.
- Secondly, they carry out those punishments while preconditions for their implementation are not met, as prescribed in jurisprudence texts.[39]
- Thirdly they go further to prescribe other forms of punishments, penalties, as well as torture and imprisonment (under the banner of Islam) whereas there is no evidence for such measures anywhere in the four sources[40] of Islamic jurisprudence, but in fact the four sources are totally against such measures.

Such conducts by governments who carry 'Islamic' labels have depicted Islam as a brutal and oppressive regime.

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[36] The Holy Qur'an: The Cow (2): 185.

[37] Al-Kafi, vol. 1, p 409

[38] Islamic punishment may only be carried out if an Islamic system has been established in every domain: socially, politically, economically, etc.

[39] E.g. preconditions for punishing a thief under an Islamic system of government are more than 40, all of which must first be simultaneously met before qualifying for carrying out the Islamic punishment. - M. Shirazi, "The Process of Change", pp 448-451.

[40] They are the Qur'an, the Sunnah, consensus (of the scholars) and reason.

Criteria for executing the penal law

Penal laws may only be executed if all pre-requisites and criteria for implementing the Islamic penal system are met, otherwise the pre-defined punishment – the *Hadd* – may not be carried out. Furthermore, all aspects of the social environment, the offender, and the offence must be taken into account before it is permissible to execute the Islamic penal code. Some of those criteria and considerations are:

- Correctness and validity of the ruling government,
- Circumstances of the offender and the offence,
- Validity of the offence under Islamic law.

Correctness and validity of Government

A corrupt government lures the people into crime, as the Arabic saying goes: "people follow the conduct of their leaders".

Religious scholars have pointed out that the criterion for the leadership of government is being a *Marje'* (religious authority), since the *Marje'* is the representative of the Imam al-Mahdi *alayhis-salam* [41]. The author has also discussed the necessity of establishing a Council for religious authorities, if there were more than one *Marje'* which is often the case[42]. The criteria for the *Marje'* are such aspects as knowledge, expertise, ability, faith, and being a practising Muslim, as detailed in the book of *Taqleed*.[43]

Therefore the government may only be led by those who are sincere and qualified to do so. Allah states in the Qur'an:

{O you who believe! Why say you that which you do not? Grievously odious is it in the sight of Allah that you say that which you do not.}[44]

Furthermore, Allah states in the Qur'an:

{My Promise is not within the reach of evil-doers}[45],

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[41] See *Islamic system of government* by the author for more details. Here the author refers to the 12th Imam who has been appointed by the Prophet (S), on instructions from Allah, to lead the Muslims after the Prophet (S). *alayhis-salam* (A). It is a mark of piety and devotion in Islam to use this salutation when mentioning the name of one of the impeccable Imams of the Ahl-ul-Bayt.

[42] Mortadha Shirazi, "Council of Religious Scholars" - *Showra alfoqaha*.

[43] M. Shirazi, *al-Fiqh* series, vol. 1 "*Ijtihad* and *Taqleed*".

[44] The Holy Qur'an: The Array (61): 2-3.

This clearly confirms that unjust and corrupt rulers may never stand to represent the system set out in Islamic teachings.

A statement in this regard from the Prophet (S) declares,

"Curse be upon those who order others to do good but do not practice it themselves, and (upon) those who preach others to refrain from evil while they follow it."[46]

In one event, someone saw the caliph cutting off the hands of a thief and said, "the overt thief cuts (the hand of) the covert thief".

Circumstances of the offender and the offence

The act of the offence, as an act does not warrant punishment until it is associated with the circumstance of offence.

Some of the criteria for the offender to receive punishment are: adolescence, sound mind, consciousness, choice, comprehension and that he is not compelled by any means[47], to commit that offence. Otherwise, the underage, the insane, the non-conscious such as the sleepwalker and the one under the influence of alcohol, the compelled, the coerced, the one ignorant of the law and occasionally even the one who knows the law, may not be punished as detailed in jurisprudence texts.

There are exceptional cases, such as an underage offender who is able to distinguish, in which case the offender is disciplined in some cases.

Also punishment will be waived in cases where on the basis of "questions of priorities" offences are committed. For example, in the case of a ship being in an imminent danger of sinking the cargo is dumped and, as in the case of the prophet Jonah, even some of the passengers may be thrown overboard. (In this event, the prophet Jonah was thrown overboard, as recorded in history.[48]) Another example is, damaging a ship in order to prevent it from being confiscated by pirates or despot authorities.[49]

Some modern schools of thought refer to what we have discussed here on the personal aspect (of the individual who commits the crime) alongside

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[45] The Holy Qur'an: The Cow (2): 124.

[46] *Wasa'el al-Shi'a,* vol. 16, p 151

[47] taking into account the priorities of the circumstances.

[48] The Holy Qur'an: The Arrays (37): 142. See also the Bible: Jonah, 1: 15.

[49] The Holy Qur'an: The Cave (18): 71.

the crime itself. Aspects of the crime and the person are not considered alone, but they are considered together. On this basis, two sets of dossiers are created for each crime. Furthermore the judge should co-operate with experts and relevant organisations such as psychiatrists, social scientists (workers) and charity organisations as a means to eradicate crime.

It is imperative to eliminate crime and not to antagonise the criminal. If the offender committed adultery and s/he does not have a partner due to factors beyond his/her ability, the judge, in co-operation with say, a marriage agency should arrange for the offender to marry. If the offender steals because s/he does not have a job, the employment agency helps the offender to find a job, etc.

There have been many references in the Islamic Shari'ah to the above criterion (circumstances of the offender and of the offence), which in fact deserves the compilation of an entire book. Some of those references are outlined below together with the nature of the consideration.

References of Circumstance

1. A history of good conduct and behaviour waives or reduces the punishment: The Prophet (S) used to waive the punishment against those offenders who generally had had a good code of conduct and behaviour, for example like the case of Hateb (committing an offence) who also had a good history of participating in the battle of Badr.

2. The poor circumstances that drive the offender to offend: For example the circumstances of Kufa before Imam Ali (A) took office of government[50]. Therefore Imam Ali (A) pardoned those who had (committed certain offences such as) stealing, adultery or sodomy, etc. and arranged for an adulteress to marry without punishing her, since they had committed those acts in chaotic and lawless circumstances.

3. If one commits minor offences but avoids major ones: as stated in the holy Qur'an:

[50] When Imam Ali (A) took office of government, he did not punish many offenders, if at all, because as a result of the policies of the previous ruler, there was widespread social injustice and deprivation of basic rights in the society.

{Those who avoid great sins and shameful deeds, only (falling into) small faults; verily thy Lord is ample in forgiveness.} [51]

4. The circumstances of priorities: On the basis of this principle the Prophet (S) pardoned those who had deserted the battle even though desertion is regarded as a significant offence according to the Qur'an.
5. Juvenile: As it has been reported "deliberate offence of a juvenile is (treated as) a mistake (and therefore unpunishable).
6. The sick (physically and mentally): where the punishment for the sick is reduced as derived from *"And take in thy hand a bundle of (straw)"*[52] and discussed in details in the book of Hudood[53]
7. Women: Imam Ali (A) ordered (his troops) in Basra[54] not to confront women, "even if you or your leaders were insulted by them."
8. The punishment of the parent: A parent may not be punished or prosecuted by the child. A parent may not be imprisoned for a debt to the child; as reported in the case of a son who complained about his parent to the Prophet (S). In a later debate, the Imam (A) said to the enquirer (about such a case) "Did you ever see (any report that) the Prophet (S) imprisoned the parent for his debt to his son?"[55]
9. The punishment of the slave is less than that of the free, as stated in the Qur'an:

   {. . . when they are taken in wedlock, if they fall into shame, their punishment is half that for free women. This (permission) is for those among you who fear sin; but is better for you that ye practise self-restraint. And Allah is Oft-Forgiving, Most Merciful.} [56]

10. The first offence carries less punishment than the second and so on. For example, in the case of hunting during the Hajj pilgrimage (to Makkah), Allah states in the Qur'an:

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[51] The Holy Qur'an: The Star (53): 32.

[52] The Holy Qur'an: (The letter) S (38): 44.

[53] M. Shirazi, *al-Fiqh* series, vols. 87-88, *Hudud* & *Ta'zeerat*.

[54] This is in reference to the Battle of Camel, which 'Aesha spearheaded against Imam Ali *alayhis-salam*, the successor of Prophet Muhammad *salla-llahu-alayhi-wa-aalih.*

[55] *al-Kafi,* vol. 5, p 136

[56] The Holy Qur'an: Women (4): 24.

{O ye who believe! Kill not game while in the Sacred Precincts or in pilgrim garb. If any of you does so intentionally, the compensation is an offering, to the Ka'ba, of a domestic animal equivalent to the one he killed, as adjudged by two just men among you; or by way of compensation, the feeding of the indigent; or its equivalent in fasts; that he may taste of the penalty of his deed. Allah forgives what is past: for repetition Allah will exact from him the penalty. For Allah is Exalted, and Lord of Retribution.} [57]

11. The severity of punishment is more during 'favourite' circumstances than during 'poor' circumstances, therefore the punishment of the married adulterer is more severe than that of the unmarried one.

12. Compelling circumstances: In such a circumstance Imam Ali (A) waived the punishment against a woman who was compelled to commit adultery.

13. A case of mistake, where, say, a man commits adultery with a woman thinking that she is his wife. For example he may mistake his wife's sister for his wife.

14. Reduced level of punishment for women: For example a woman is not killed if she commits apostasy. The difference between this and the example of a previous case (no. 7) is that the previous case was concerned with *Ta'zir* punishment and in this case it is concerned with *Hadd* punishment.

15. Punishment may not be carried out in certain places such as in enemy land, or in the Holy Mosque (in Makkah). For example when someone commits an offence and seeks refuge in a holy mosque.

16. Punishment may not be carried out at certain times, e.g. punishing a thief when there is a famine.

17. Punishment may not be carried out when there is doubt. The Prophet (S) said, *"punishments are waived by doubt (or uncertainties)."* This concerns any aspect of the case; whether the judge, the witness or the offender.

18. Punishment my not be carried out in extreme weather conditions, i.e. when it is very hot or very cold.

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[57] The Holy Qur'an: The Table Spread (5): 95.

19. *"The establishment of an Islamic government annuls whatever preceded it."* as reported from Imam Ridha, (A).
20. *"Islam annuls whatever preceded it."* i.e. one may not be punished for offences (committed) before becoming Muslim.
21. *"Iman annuls whatever preceded it."*, i.e. one may not be punished for offences committed before guidance to the teachings of *Ahl-ul-Bayt*[58].
22. If one commits a 'good' deed, it annuls a 'bad' one, as stated by some of the scholars of Islamic jurisprudence.

In a report, Imam Sadiq (A) narrates that during the government of Imam Ali (A), a man was brought to him on suspicion of murder. He was found in a derelict place holding a bloodstained knife, and standing next to a slain man in a pool of blood. Imam Ali (A) asked the man "what do you have to say?" The man replied, "I killed him." Imam Ali ordered him to be detained. When he was taken away, another man rushed to Imam Ali (A) and said, "I killed the man." Imam Ali (A) said to the first man "what made you confess to the murder?" The man replied "I could not have said (otherwise) when these people had seen me with a bloodstained knife in my hand standing next to a slain man in a pool of blood. I admitted this in fear of being beaten to make the confession. In fact I had just slaughtered a sheep nearby. As I needed to pass water I went to that derelict place, where I noticed the murdered man and I went to take a closer look. At that moment these people arrived and saw me at the scene." Imam Ali (A) said take these two to (Imam) Hassan (A) and ask him for the ruling for their case. After hearing their stories, Imam Hassan (A) said, tell *Amir-ul-Mu'minin* (Imam Ali (A)) that: "If he (the second man) killed the man, he also gave life to this man (the first man). Allah the Almighty says (in the Qur'an):

{. . . And if anyone saved a life, it would be as if he saved the life of the whole people.} [59]

Therefore they both go free and the blood money for the killed man is taken from the public fund (the treasury).

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[58] *Ahl-ul-Bayt,* literally meaning house members, refers to the pure or *Ma'soom* progeny of the holy prophet Muhammad. They are the holy prophet Muhammad, his daughter Fatima al-Zahra', and the twelve Imams or caliphs (successors of the prophet).

[59] The Holy Qur'an: The Table Spread (5): 32.

These are some of the many examples that can be found within the Islamic jurisprudence, Teachings of the Prophet (S) and (Islamic) history.

Validity of the offence under Islamic law

The third aspect, which must be taken into account if the Islamic penal code were to be carried out, is that the committed act must be regarded as an offence under Islamic law. As mentioned previously, Islam does not consider as an offence, most of what is defined an offence under-man made law. Anyone who would take an inquisitive look into the courts-of-law and prisons in the democratic countries reveals this truth. Tens of thousands of people who are convicted in the courts-of-law and therefore imprisoned would neither be tried nor imprisoned under an Islamic system. And if, one day, an Islamic system of government is established, there will be no trace of those courts of law, prisons or the prisoners. We shall mention 100 aspects (of man-made laws) the violation of which results in prosecution, whereas Islam considers all of them to be legal and the human right of the individual whether a Muslim or not. This is of course in relation to the so-called free and democratic countries. As for the so-called third world countries, which include the Muslim countries, the situation is worse.

These issues, which we shall mention here, are free in Islam but restricted (to various degrees) under man-made laws in that if one violates those restrictions, they will be prosecuted. These issues are freedom[60]:

of buying[61],
of selling,
of loan security,
of surety,
to make a deposit (of any kind) for safekeeping,
to make any new kind of contract not prohibited by Islamic jurisdiction,
of bail,
of arbitration or settlement,
of insurance,
of forming a partnership,

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[60] The freedom of the individual in engaging in any of the above are restricted in western democracies in one form or another, for example by the imposition of taxes, charges, stamp duties, or the need to seek permission form the authorities, etc. whereas no such restrictions are permissible under Islam. needless to say, there are few activities that are classified as illegal such as production or sale of alcohol, and gambling.

[61] i.e. no value added tax (VAT) or any other form of taxation is levied on goods in Islam.

of investment (*Mudahrabah*)[62],
of farming investment[63],
of irrigation investment[64],
to procure the land (for any kind of development)[65],
to procure anything permissible[66],
of borrowing,
of letting,
to make a power of attorney,
to make an endowment,
benevolent or trust fund,
to give alms to charity,
to make a gift,
to make a conditional or unconditional donation,
of abode,
of time-limited abode,
of racing,
of archery,
to make a will,
for men and women to marry either long term or temporarily,
to divorce,
to exercise *Khol'a*[67] divorce,
of breast-feeding,
to travel,
to settle in a place,
to open a shop,
of admission (of guilt),
to give prizes etc. to the winner of a competition,
of publishing,
in the amount of dowry and other particulars of marriage,

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[62] *Mudahrabah* is a business scheme where one party contributes the capital, and the other the labour or expertise, and the profit or loss of the venture is divided between them according to a previously agreed ratio.

[63] This scheme is similar to that above with difference that one party provides the farmland and the other the workforce. Similarly the profit or loss of the venture is divided between them according to a previously agreed ratio.

[64] This scheme is similar to that above with difference that one party provides the farm and the other agrees to irrigate it. The profit or loss of the venture is divided between them according to a previously agreed ratio.

[65] . . . without the need for any permission from any authority.

[66] . . . e.g. fishing, mining, etc. without the need for any permission from any authority.

[67] This kind of divorce is initiated by the wife.

to practise any desired vocation,
to pursue useful knowledge with the result of becoming a doctor, engineer, lawyer, or political or economic expert or otherwise or to become a religious scholar or lecturer or writer etc,
of responsibility or promise of oath,
of vows,
to exercise the right of pre-emption,
to partake of permitted food in any way desired,
to revive the barren land[68],
of inheritance
(in that the legacy belongs to the inheritor according to the rules explained by the emissary of Allah - according to Islamic law. The Prophet (S) said:

"Whoever dies leaving a family with no guardian then it (their welfare) is my responsibility, and whoever dies leaving wealth behind then it belongs to the heir".[69]

This is in contrast to the man-made laws, which can make up to ninety per cent of the legacy to go to the government, as it is well known),
to consult any legal judge[70],
to testify (in front of a particular judge) and seek the testimony of others,
to demand blood money, or punishment or to forgive,
to practise agriculture,
to manufacture,
of construction,
for a person to be without nationality or identity or other formalities that are commonplace now,
to publish a newspaper,
to publish a magazine,
to own a radio broadcasting station,
to own a television broadcasting station,
of action,
to express an opinion, of meeting or gathering,
to form a trade union,
to form associations,
to form organisations,

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[68] Without the need for any permission to do so from any authority or for any payment in exchange for the use or possession of that land.
[69] *al-Kafi,* vol. 1, p 406.
[70] For example to have his case dealt with a particular judge rather than other judges.

to form a political party,
to elect[71],
of governorship,
of guardianship or of religious leadership,
to make or accept an envoy or representation or ambassador
to choose any occupation in the civil service,
from being monitored by the government using spying or phone tapping equipment or by a secret police,
to give birth to any number of children,
for a man to marry up to the limit of four on a permanent basis or more on a temporary basis,
of beliefs; Allah Almighty has said: '*There is no compulsion in religion*',
of type of food and drink consumed and clothes worn etc,
to come and go from one's house at any time of day or night,
to build mosques,
to build schools,
to build religious centres,
to build hospitals,
to build clinics,
to build publishing houses,
to build cultural establishments,
to build hostels and hotels,
to build maternity units,
to build old peoples houses,
to set up banks,
to join a students' union,
for a person to leave any institution or position of employment,
to furnish a house or shop in any way,
to select any type of vehicle required,
of (any deal or contract) interaction with others,
to make or accept a loan,
to grant the custody of any endowment or entailed estate to anyone,
to choose a name for himself or for a place associated with him,
to set up poultry farms,
to follow the rulings of any competent religious authority desired,
to choose any lecturer or preacher desired,
to record any contract with any religious scholar.

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[71] There is no age limit for individuals to vote or take part in any election, i.e. children have the right to take part in elections too.

We have referred to some of them in details in the book "The New Order for the World of Faith, Freedom, Prosperity and Peace".

The one hundred issues mentioned above are free in the Islamic framework but are restricted under man-made law, and violation of these restrictions would result in prosecution and imprisonment. If these one hundred issues are multiplied by the number of violations that could be committed, as an example we shall mention only ten possible violations here, then there would be one thousand cases in which one would be liable to prosecution and imprisonment. The ten possible violations of the imposed restrictions may be due to the individual's

- ignorance;
- forgetfulness;
- mistake by not applying for a permit, say in time;
- temptation and encouragement, by a person, to counterfeit it;
- not thinking it being necessary, from the religious view point, to comply with the restriction;
- not getting the chance to do it;
- not setting high priority for it;
- not being possible for him to do it;
- being prevented from doing it by government (for any reason);
- or due to exceptional circumstances e.g. his life being in danger.

So as can be seen from the above, these are one thousand violations in not applying for a permit. Assuming that each of these violations were committed by, say 10 individuals, then there would be ten thousand individuals who would be taken to the courts of law and either imprisoned or fined. All of this is clearly accompanied by wastage of time and money as well as insult to the dignity of the individual. This is in addition to the swelling of bureaucracies and the personnel recruited to administer them, which are in turn a great burden on the public purse (to say the least).

When can prescribed punishments be carried out?

Islam only permits the execution of punishment after achieving and securing the health and safety of the society, as seen from Qur'anic verses and Prophetic traditions; for example Allah states:

{and do no mischief on the earth after it has been set in order}[72]

[72] The Holy Qur'an: The Heights (7): 85.

In a hadith[73], it is reported, *"Government and Hodud are for the Imam of the Muslims"*[74] which means that during the circumstances and time of the presence of the (infallible) Imam of the Muslims the rules of Islam may be executed, and the significance of the presence of the Imam of the Muslims means he is authorised to establish the rule of Islam. It is clear the rule of Islam is only established when all freedoms are made available to the masses and everyone is able to achieve whatever s/he wants in terms of knowledge, wealth, position, etc. according to their ability and expertise, in order to attain a prosperous life befitting their life and dignity.

For if the atmosphere and political/social/economic environment is not Islamic, and if one is not able to obtain enough income to lead a decent life, how can his hand be cut off for stealing? If he cannot find enough money to get married, how can he be lashed (for committing adultery)? If alcohol and decadence is freely available in the country, how can he who indulges in them face the *Hadd?* Needless to say if one admits to stealing, and gives back the good, his hand would not be cut off.

Henceforth, we have in hadith *"(embracing) Islam annuls all previous practices (of the new Muslim)"*[75] and *"Iman annuls previous practices"*[76]. It is also applicable, as it can be concluded from other hadith, that "the assumption of the office of government by a just ruler annuls all previous practices (of illegal acts committed by individuals.)". This is in addition to the invalidity of coercion that, as the author has mentioned in his works on Islamic jurisprudence, includes to the social/environmental coercion, as well as to coercion on the individual personally. There are also the exceptional circumstances of 'desperation', 'not knowing', and 'not being able'[77]. Furthermore we have the principle decreed by the Prophet (S),

[73] A hadith is a statement of the prophet Muhammad or one of the Imams of the *Ahl-ul-Bayt*.

[74] *Wasa'el al-Shi'a*, vol. 18, section 13, p 7.

[75] *Bihar al-Anwar*, vol. 40, p. 235. The words in brackets are included for clarity. Translator

[76] Here *Iman* means adhering to the teachings of the *Ahl-ul-Bayt* peace be upon them.

[77] This is in reference to hadith *"(in) nine cases my people would be excused."* given earlier.

"The Hudood (punishments) are waived by uncertainties."[78] These uncertainties could be associated with either the judge or the defender.

[78] *Mustadrak el-Wasa'el,* vol. 3, p 219, section 21, hadith 4

Chapter 4: Rights of a Prisoner[79]

The prisoner is a human being, and s/he has the dignity and freedom, as defined by Allah the Almighty. Normally the prison sentence should carry as little hardship as possible while it can still be called a prison sentence, as "necessity is relative"[80], i.e. it is judged accordingly. Whether the individual is being sentenced according to Islamic law, where there are rare cases for imprisonment, or man-made law as currently practised, the authorities must ensure that the prisoner is treated according to his human dignity.

Under current prison regimes, two illegal practices are being committed,

- the prison concept itself, and
- the criteria and conditions of prisons.

If the government is committing the first, at least it should ensure that the second is not practised, i.e. the circumstances of the crime and the criteria for the crime and imprisonment must be observed and taken into account.

It is imperative to treat the prisoner as a free individual with the exception of being confined to prison. This may be achieved with the following measures, some of which are manifested in some of the international convention for prisons, and these measures are derived from Shari‘ah laws which are on the basis of the principle *"people have dominion upon their wealth and their selves"*[81]*:*

Freedom to engage in business contracts and trading

The prisoner may choose to engage in all dealings and transactions inside the prison or outside it, personally or through an agent, or by telephone. These dealings could be of any nature such as sale, buying, loan, letting, investments, agriculture, *Hawalah* (to agree to be responsible for one's debt) and even *Kafalah* to be a guarantor for someone to be released from custody if possible.

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[79] This chapter is taken from the author's *al-Fiqh* series, vol. 100, book of "Rights", pp 476-481.

[80] A principle in Islamic jurisprudence, see *al-Fiqh* series, vol. 141, "Principles of Jurisprudence", by the author.

[81] This is a hadith or statement by the prophet Muhammad peace be upon him, which therefore forms the basis of a principle in Islamic jurisprudence. The hadith has been reported in many references such as: *'Awali al-Le'ali,* vol. 1, p 222; *Nahj el-Haqq,* p 494. See also *al-Fiqh* series, vol. 141, "Principles of Jurisprudence", p 135, by the author.

Marriage

The prisoner may engage in marriage or divorce for himself or for others, as a representative or guardian, for those inside or outside the prison. He could also be an agent or a trustee for endowment, charity, etc.

Witness

The prisoner may be a witness in person or remotely for those inside or outside the prison. For those outside, the prisoner may be a witness via such means as the telephone. An exception, as the author has stated in jurisprudence texts, is in the case of divorce, if the witnesses are not physically present at the location of the divorce proceedings, but wish to take part remotely via such facilities as the telephone.

Writing, Teaching, Lecturing

The prisoner may engage in public speeches, teaching, writing to the press, and acting for those inside the prison or outside through various means such as TV, radio, etc.

Skills

The prisoner may engage in any profession such as trade, manufacturing, painting. He may also engage in studying and writing books, etc.

Sport

Space and facilities for outdoor activities such as sport must be provided for prisoners.

Hobbies

The prisoner may decorate his cell with any painting and artefacts, chandeliers and he may keep domestic or wild animals as pets.

Family visits

The prisoner's family may visit him at any time they wish. The prisoner's spouse may also visit and stay with him. It is reported that Imam Ali (A) allowed the prisoner's family to stay with him. It is also reported that a woman complained about her husband and sought help from Imam Ali (A). The husband did not provide sustenance with the intention to harm

her. Imam Ali ordered the husband to be imprisoned. The husband asked for his wife to be with him, and Imam Ali granted him his request.[82]

Segregation

Segregation between prisoners: e.g. men, women and juvenile prisoners if this does not pose a problem or danger. Dangerous prisoners must be segregated from the rest of them. Also those prisoners who pose harm to others such as the mentally ill must be isolated from others. Prisoners may be accommodated together, for example if different members of a family wish to be held together then this may be so even if there are different categories i.e. men, women and children.

Health and Hygiene

The prisoners must be provided with healthy environments from the point of view of space, fresh air, lighting, heating, ventilation, suitable hygienic lavatories, showers, etc. Hot and cold water must be provided according to the time of the year and the prisoners must have access to the showers whenever they wish to use them.

Food and Drink

The prisoner must be provided with food, drink and suitable clothing throughout the year as well as medical attention and medicine as and when required. All of this must be provided in the prisoner's comfort.

Imam Sadiq (A) is reported as saying that when Imam Ali (A) was assassinated by Ibn Moljim, while on his deathbed, Imam Ali (A) said:

"Detain this prisoner, feed him and treat him well while in detention. If I live I shall deal with him; if I want I shall seek (compensation) from him, and if I want I shall forgive him and I shall reconcile with him. But if I die it is up to you. If you decide to kill him do not mutilate him."[83]

However, it is clear that Imam Ali (A) wished his followers and next of kin to forgive his killer Ibn Moljim, as the former is quoted in the *Nahj_ul_Balaghah:*[84]

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[82] *Al-Ja'fariyat,* p 108.

[83] *Qurb al-Asnaad,* p 67.

[84] Letters, 23. *Nahj_ul_Balaghah*, (meaning Peak of Eloquence) is a collection of speeches, sermons and letters of Imam Ali (A).

"Until yesterday I was a companion of yours, today I am lesson to you, and tomorrow I shall leave you. If I survive, I shall be responsible for my blood [i.e. whether to prosecute or to forgive the perpetrator], *and if I die, death is my destiny. If I forgive, forgiveness is a means of closeness (to Allah), and it (forgiveness) is a good deed for you, therefore forgive (him),* ***Don't you love Allah to forgive you?***[85] *"*

There are exceptional circumstances where the prisoner is subjected to harsh treatment in an attempt that this hardship will make him relinquish the rights of others, (which is the outcome in most cases), when he will be released.[86] An example of such cases is the dispute raised by a woman to Imam Ali (A) about her husband. The husband had stopped his sexual activities with her and at the same time refuses to divorce her. The woman wanted her husband to either resume his sexual life with her or divorce her. It is reported that Imam Ali (A) detained the husband in a shed and fed him on one quarter of his normal diet in order to make him divorce his wife. It is clear that this imposed hardship was to make the husband either resume a normal sexual life with his wife or divorce her, in either case he would be released from detention.[87] In another similar report, unless the husband would resume normal (sexual relationship with is wife), he would be imprisoned in an enclosure made of straw, and his food and drink rationed until he divorces (his wife).[88]

Students of the prisoner

If the prisoner was a lecturer, for example, his students should be allowed to meet him regularly so as to attend his lectures, and or discuss and debate issues of concern.

Psychological well-being

If the prisoner suffered from mental disorder, then he must receive appropriate treatment either in prison or in a specialist hospital if deemed necessary. It is necessary to make provision for such facility/environment to help him maintain a healthy state of mind.

Women prisoners

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[85] The Holy Qur'an, The Light (25): 22.

[86] See for example *Fiqh al-Ridha,* p 248, or *'Awali al-Le'ali,* vol. 3, p 395, and *Mustadrak el-Wasa'el,* vol. 6, p 27.

[87] *al-Kafi,* vol. 6 p 133.

[88] *Wasa'el al-Shi'a*, vol. 22, section 11, p 28775

In women prisons, specific accommodation, facilities, and medical care must be provided for women to use, similar to any such facilities outside prison. Similarly if pregnant woman prisoners need medical facilities not available in prison, they must be transferred to maternity hospital to give birth. They must be provided with the care and facilities they need before and after giving birth. Mothers should be allowed to keep their babies and should be provided with the necessary facilities for their babies, and they must have their freedom as if they were outside prison. They should also be allowed to keep in touch with their children outside prison.

Inspector of prisons

There must be an independent inspector of prisons to check the welfare of the prisoners and establish that prisoners are being treated according to the law in all aspects. It is important that the prison inspector is not from the prison management or its affiliation. He must be from different affiliation, for example from an opposition party etc. Any problem or shortcoming must be brought to the attention of the prison authorities and measures recommended to address those problems. If the latter fail to address those issues then they must be raised with higher authorities.

Chastisement of prisoners

The prison management may not punish prisoners. In the event of prisoners committing any offence, then this must be reported to the police and other legal authorities. It is imperative that the police and the prison service are segregated. A prisoner must be treated like any other free person outside prison when an offence is committed.

The prison management may not give any authority to any of the prisoners to punish other prisoners (for their wrongdoings). However, teaching and training programmes may be set up by prisoners to teach fellow prisoners in any field of learning, material or spiritual, morals, economics, politics, sociology, etc.

Offence of prisoner

If a prisoner commits an offence, s/he will go through the same procedures of police investigation, appearing before court of law, etc. as any other person would outside prison. The crimes prisoners commit inside prison carry the same penalty as others who commit outside it. The same law applies to individuals inside the prison as to those outside.

The right to a defence lawyer

The prisoner may ask for a solicitor to defend him, may ask for an interpreter if needed. If the prisoner cannot afford the cost of them, the relevant authorities must pay for these.

Absolutely no to torture

The prison management may under no circumstances use inhumane and brutal punishment against the prisoners, even if it is to discipline them. Therefore, they may not hold prisoners in solitary confinement, or in a dark cell, or flood the cell, or tie the prisoner to the wall, or chain them, or any other means of torture.

Amongst prisoner’s rights

Every prisoner must always have the opportunity to present his requirements or complaints to such authorities as the prison governor, the prison inspector, etc. It must be made known to the prisoners that they can be in touch with their friends or families through visit, correspondence, etc. When the prisoner receives visitors, the prison authority may not eavesdrop on their conversation or may not use glass screens to keep the prisoner apart from their visitors, regardless of the prisoner's nationality. If the prisoner wishes to contact a lawyer or charity organisation or any other such institution or individual, the prison authority should facilitate his demand. If the prisoner has been described as dangerous by a judge, then the prison authority may limit his contacts according to the judge's written permission.

Prison rules

Prison rules and regulation must be given to every prisoner, in written form for those who can read, and on audiocassette for those who cannot.

Access to media

The prisoners should have access to the communications media such as the newspapers, magazine, radio and TV, etc. A comprehensive library must be provided for all prisoners; men, women and children. If a prisoner needed a book not available in the library, the prison authority must

provide the book whether at the expense of the prisoner if s/he can afford it or that of the prison budget.

Practice of Religion

Every prisoner must be allowed to practice his/her religious duties such as prayer, fasting and to possess the Qur'an and religious books such as prayer and supplication books, etc. Also if the prisoner sought the services of a religious clergy then s/he must be provided with one. The prisoners may perform congregational prayers either themselves or with the help of external clergies. During the holy month of Ramadahn, the prisoners who fast must have their food provided during the allocated times; i.e. before dawn and after dusk. During the month of the Hajj pilgrimage those prisoners who are able and wish to go to Hajj must be allowed to do so after taking the necessary measures to ensure their return to prison, such as taking out bail. Similarly if a prisoner had made a vow to visit or remain in a holy site or shrine, s/he must be allowed to do so while on bail. Also if the prisoner needed a secluded place for study or prayer and worship, s/he must be provided such a place.

All of this is also applicable to a non-Muslim prisoner, and if s/he had special ceremonies s/he must also be allowed and facilitated to practice them.

Religious rites and festivals

A prisoner must be allowed to attend religious festivals and all other important religious ceremonies such as those on the occasion of the birthday or demise of the Prophet (S) and other infallible Imams (A). The prisoner must also be allowed to visit his sick family members or attend their funerals or weddings, while on bail for instance. It is reported that Imam Ali (A) used to release the prisoners, who were debtors or murder suspects, to attend Friday prayers and then are returned to prison by their guarantors.[89]

It is also narrated that Imam Sadiq (A) said that the leader must arrange for the prisoners to attend congregational prayers on Fridays and on other

[89] *al-Ja'fariyat,* p 44.

festive occasions such as Eid. When they perform their prayers they are returned to prison by their guards.[90]

Choice of prison location

The prisoner has the right to request transfer from one prison to another in a different locality, if feasible. In general, the principle is that the particular offender must be imprisoned, but the details of the imprisonment are flexible. The prisoner may request to be imprisoned in a house, even in his own house if the cost of such arrangement is not too high for the government, unless the prisoner is prepared to pay for the cost of this arrangement such that the authorities are assured that the prisoner remains in the house. For example by means of mechanical or electronic tagging, or if the prisoner promises not to leave the house, and if the authorities believe his words. We have shown in jurisprudence texts that the prisoner may serve his sentence in instalments.

Prisoner’s possession

The prisoner's possession such as clothes, money, watch, jewellery and other valuable items must be listed and kept for the prisoner and returned to him when leaving the prison.

Prison uniform

The prison authority may not impose the wearing of uniform on prisoners and they may wear what they choose.

Receiving mail and goods

In general the prisoner may receive goods from outside prison, with the exception of forbidden items such as narcotics unless prescribed by medical expert.

Informing next of kin

The family of the prisoner must be informed immediately of his/her imprisonment. They must also be informed if the prisoner is transferred to

[90] *Man la Yahdharuhul-Faqih,* vol. 3, p 31. See also *Wasa’el al-Shi‘a,* vol. 7, section 21, *and Mustadrak el-Wasa’el,* vol. 6, section 17.

another prison, or if the prisoner is seriously ill or if s/he dies. Similarly the prisoner must be informed of the illness or death of a family member. As it was previously mentioned, the prisoner must be allowed to visit the sick or attend the funeral of a family member. On the other hand, if the prisoner wishes to be transferred to another prison, a comfortable means of transport must be used, and the cost of transport must be met by the prisoner if s/he requested the transport and can afford the cost of transport, otherwise it must be paid from the prison budget.

Men and women prisons

Prisons for men must be staffed by men entirely and those for women must be staffed by women only. Men may not staff women prisons and vice versa. Male staff must be married and so too must female prison staff[91]. If any of the prison staff wanted to live with his/her family, in the living quarters of the prison complex, they may do so. Juveniles must be segregated in prisons. It is important to have separate prisons for boys and girls.

Insanity of prisoner

If a prisoner became insane s/he must be treated and if their illness is incurable, s/he must be detained in mental hospital or unit. If it was diagnosed that the prisoner would develop insanity or other such illnesses (as a result of being imprisoned) s/he should be released from prison.

No to Violence

Prison staff may not use force with prisoners unless in cases such as self-defence, or to prevent prisoner escape or to prevent a prisoner harming others. In case force was used it must be reported to the prison governor immediately. Prison staff must be trained to deal with abusive prisoners. Prison staff may not carry guns unless they have written permission and that they are qualified to use it.

Studying

Teaching and education program must be provided for the literate and the illiterate prisoners as well as the young offenders so that their time is not wasted without any education for those who want to study.

Employment inside prison

[91] This is to reduce or prevent such conducts as sexual harassment and abuse.

The prison management must prepare prisoners to work in accordance with their intellectual and physical abilities. Work opportunities must be available to stimulate and also encourage them to earn for themselves and their family through honourable means. Prisoners must also be trained to gain new work related skills especially for the young prisoner. Prisoners must choose the work they wish to do and not be compelled to do so. The standard of work conditions inside prison must be the same as those outside so that prisoners are prepared for life outside. The interest of prisoners must take priority over that of the prison institution.

Labour law

The working conditions such as the number of working hours per week must be the same as those for workers outside prisons. Similarly prisons must have a day off work and must have enough time to engage in recreational activities.

Observation of religious occasions

They must also be given the chance to observe or celebrate religious occasions.

Equal treatment

If a prisoner accomplishes manual or scholarly work s/he should be paid according to rates outside the prison. He should be allowed to spend his/her earnings on himself or his family. The prison should be provided with the facility to secure his wealth either through a bank or through the prison service itself.

The insane

The insane, and mentally retarded may not be imprisoned. As for one who suffers from periodic insanity may only be imprisoned (for committing offences) during recuperation periods.

Diminished responsibility

An individual may not be imprisoned for a crime if s/he was forced, impelled, etc. to commit such an act.

Death of prisoner

If the prisoner dies as a result of part of the prison building collapsing or due to flooding, earthquake, etc. and the prison management had

anticipated such events[92], in that case the prison authority should pay compensation (blood money). Similarly if the prisoner lost a limb or sustained other injuries, he is entitled to compensation. However, if the prisoner dies of natural causes there is no compensation to pay.

Prison building

The prison building must be strong enough such that prisoners do not easily damage it. There should be no tools or means inside the prison that could be used to damage the building, harm other fellow prisoners or even harm themselves in any way, such as hanging.

Prison staff

Prison staff must have an appropriate mental and intellectual level as well as being physically able. Prior to assuming their post in prison they must have received relevant education and have attended specialist-training programmes to prepare them for the tasks involved in such posts. Furthermore they should maintain those standards but also develop further during their service. They must have a conduct such that they set a good example to the prisoners in terms of behaviour and moral values. Prison staff as well as the general public must be made aware of the role and importance of prisons and the prison service. The salary of prison staff must reflect this aspect and must compensate the important hard work involved. There may even be bonuses given in appreciation of the excellent services provided by the prison staff. Such bonuses could include leave of absence, etc.

Expert services

The prison management and staff must be supported by specialist services such as those of psychologists, sociologists, medical, mental, and technology experts on a permanent basis. This is to give prisoners the best opportunity of education and training while in prison in order to deliver a reformed individual to society.

Education of prisoner

Prison managers and higher authorities must consider prisoners as part of the society and not the outcast from it. Therefore a prisoner must receive

[92] e.g. through forecast by relevant authorities, expert recommendation or evaluation, etc.

ethical and moral treatment and education as a person and as a responsible member of society. Arrangements must be made to ensure that a prisoner is appropriately received by the society when out of prison.

After release

The community must be made involved in preparing a prisoner to interact with society. Social workers must ensure that they are in contact with their families and that with the aid of relevant organisations the newly released prisoner's civil rights as well as those for social security are protected within the framework of Islamic law.

Prisoner rights group

There should also be organisations recognised by the government, responsible for safeguarding the rights of the newly released prisoners and in charge of visiting them, arranging for their recreation and helping them to join the society as reformed members.

Prisoner’s future

The prison service and other authorities associated with the prisoner such as the judge, etc. should contemplate about the future of the prisoner as soon as the prisoner enters prison. The prisoner should be encouraged to be in contact with organisations that can help him and his family and prepares him to rejoin the community again.

Prison categories

The law applies to the different kinds of imprisonments, which are divided into three categories under Islamic system:

Provisional Detention

In this case a suspect is detained pending investigation into the case. It has been reported that the Prophet (S) detained a murder suspect for up to six days pending investigation.[93] It is also reported that Imam Ali (A) detained a murder suspect while investigating his accomplices. This policy is not specific to murder cases only but is applicable to other cases. It is reported that Imam Ali (A) judged a debtor to be detained. If it were

[93] *Al-Kafi,* vol. 7, p 370, hadith 5.

proven that he was bankrupt he would be released in order to earn money, and if appropriate, pay back his debt.[94]

Fraud Imprisonment

In this case someone is imprisoned for transgressing or violating other people's right, which is a crime. It is reported[95] that Imam Ali (A) imprisoned three categories of offenders:

1. One who usurped (others belongings/wealth/land etc.);
2. One who extorted the wealth/property of the orphan;
3. One who embezzles the deposit entrusted with him.

Criminal Imprisonment

In this case those convicted of committing a crime are imprisoned. The author has mentioned a number of such cases in the "Book of Hudoud".[96]

In a reported case[97], four individuals engaged in a brawl using knives and while they were drunk. Imam Ali (A) judged to imprison the four until they were sound again. Two of the four died as a result of the severity of their injuries. Imam Ali (A) judged that all four were responsible for the injuries sustained on the four. The blood money of the two dead men is shared equally between the four and the compensation for the other two is taken out of the blood money given to the deceased's next of kin.

Traditions and customs of the new judge

At the end of this section it is worth mentioning that it is a good practice that the new judge looks at the affairs of those imprisoned by the previous judge. This is to make sure that no one innocent or one who served his sentence remains in prison.

In the book al-Mabsout[98] the author, Sheikh al-Tousi, said when the judge assumes office, the first thing he should look at is the affairs of the prisoners in an isolated prison, as prison is a (place of) torment (for the prisoner). There may be cases where someone has served beyond his sentence unnoticed.

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[94] *Tahdhib al-Ahkam,* vol. 6, section 22, p 232, hadith 19.

[95] *Tahdhib al-Ahkam,* vol. 6, section 22, p 299, hadith 43.

[96] *al-Fiqh* series, vols. 87-88, *al-Hodoud wal-Ta'zirat*.

[97] *Tahdhib al-Ahkam,* vol. 10, section 4, p 240, hadith 5.

[98] *al-Mabsout fi Fiqh al-Imamiah,* by Muhammad ibn al-Hassan al-Tousi, vol. 8, p 91, section on the tradition of a judge.

In *Sharae' al-Islam*[99], (the author) Muhaqqiq al-Hilli states (the newly appointed judge must) inquire about the prisoners and prepare a list of the names of the prisoners. In a public announcement the new judge calls upon the plaintiffs against each of the prisoners to appear on a set date. Then the judge asks each of the prisoners the reason for their imprisonment. The judge then seeks the plaintiff's claims and if the latter's claims stand the prisoner is returned to jail, otherwise he is freed; unless someone else raises a claim against him in response to a public announcement by the newly appointed judge. Also if a prisoner appears before the (new) judge and says, "I have no accuser", and then if no plaintiff appeared against the prisoner, after a public announcement he is set free. It is stated that he would be freed under oath. Other scholars have stated similarly too.[100] This is also the case in other sects of the Muslims. One of the senior scholars; Abu Isaac al-Shirazi states, "It is desirable for a new judge to look into the affairs of the prisoners, for prison is torment and punishment (to the prisoner), and perhaps there are those who must be released.

Some aspects of the duties of a judge

It appears that the duty of the judge does not end with issuing the prison sentence, but it is his duty to follow the affairs of the prisoners through his assistants and through government organisations responsible for preparing prisoners to join the community again. Such organisations must create the atmosphere to encourage the prisoner to want to live within the law, to create the sense of responsibility and respect for himself and the community.

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[99] *Shara'e' al-Islam,* vol. 2, p 320, Tradition of a Judge.

[100] Muhaqiq al-Hilli (602-676H) in *al-Mukhtasar al-Nafi',* Abdul-Aziz ibn Baraj al-Tarablosi (400-481H) in *al-Muhadhab,* 'Emad al-Din bin al-Tousi in *al-Wasilah ila Nayl al-Fadhilah,* 'Allamah al-Hilli (647-726H) in *Qawa'ed al-Ahkam fi Masa'el al-Halal wal-Haram,* Muhammad Jawad al-Hussain al-'Amili in *Miftah al-Karamah,* vol. 10, p 26.

Chapter 5: Rulings

In this chapter some of the *Fatwa*'s or decrees issued by Imam Muhammad Shirazi, relating to the circumstances of prisoner are presented. Only few rulings on specific queries are presented for brevity.

Imprisonment

Under the Islamic system, prison is prescribed for specific cases, and therefore no one has the right to imprison someone except the legal Islamic judge/authority who can do so in the specific cases prescribed by Islam as mentioned in relevant books such as *"al-Hudoud"*[101].

- If the imprisonment was not in accordance with the criteria prescribed (by Islam), then it is permissible for the prisoner to escape on the condition this does not cause (him) harm. Also it is imperative for he who is able to help the prisoner to escape to do so for this is a count of "prohibiting evil".

- It is permissible to escape from prison under an oppressive regime, but in the case of a just and consultative system, one may not escape from the prison. The same is applicable in escaping from the ruling of the oppressive regime and the ruling of the just system.

  This is because the ruling of the despot is not valid even if it is in accordance with the laws of the Shari'ah, since he has no right to implement the laws of the Shari'ah. As for the ruling of the just ruler, then it is imperative to implement it, if it is not known to be incorrect, but if it is known, then it is not imperative to abide by it.

- If one was illegally imprisoned, it is permissible for him to damage the building or dig a tunnel in order to escape. As to whether or not he is responsible for the damage, it appears that if the place belonged to the oppressor, then the prisoner is not responsible, and if the place belonged to another individual from whom it was forcefully taken, then the oppressor is responsible for the damage.

[The difference between confinement/restriction and imprisonment should be noted. If someone apprehends someone such that he cannot move or leave, and in this process he looses, say, his horse, vehicle, goods, etc. then he is not referred to as imprisoned but he is confined or restricted.]

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[101] Shirazi, Muhammad; *"al-Fiqh* series", volumes 87-88, *"al-Hudoud wal Ta'zirat"*

Confinement

- If one is restricted or confined by another individual, the confined may take his case to the legal Islamic judge to prosecute the offender.

- No one has the right to restrict or confine another individual in a place, for this would be contrary to the Islamic principle declared by Rasulollah *salla-llahu-alayhi-wa-aalih,* “People have dominance over their selves and their wealth”. If one was restricted or confined, it is not obligatory for him to remain (there). In fact it is permissible for him to go to anywhere he wishes, unless this constitutes extreme danger for him.

- If he knows that if he does not comply with the detainer, or does not stay in the place of confinement, he would be subjected to extreme harm, then he may remain there. On the other hand, if his dissent is of higher priority, then he must leave even if it causes him harm. The same is applicable to cases of exile and deportation. If a despot sends to exile or deports an individual, he may return back to his normal place unless he would be exposed to danger as mentioned earlier.

- If one is restricted or confined, and as a result he incurs losses; for instance he loses his horse, vehicle, goods, or belongings are stolen, then the offender is responsible for the losses incurred by the victim.

  This is due to the principle of “One may not do, or see harm”, and because it is the accepted norm, and thus is covered by the ruling of guarantee. In fact it is not unlikely that the guarantee could extend to such cases like when one confines a woman with criminals, and as a result she is raped, or if one confines an individual who is the father/brother of a lady, and consequently the lady is raped. The individual who confined the woman or the father/brother of the lady is responsible for her *Mahr* or dowry (as one form of compensation). [This case is only dealing with one particular aspect of the compensations involved, and not with criminal issues and their relevant punishments.]

- If the one who has been confined or restricted loses income, for example if he normally earns certain amount, and he does not manage to do so because of the restriction or confinement, then the offender is responsible for the loss of income.

This is again based on the principle of “No Harm” mentioned above. So if the confined usually does one particular job, then the culprit is responsible for the wage lost. If the victim works in more than one job, then the culprit must forfeit the wages for the jobs the confined usually does. In another scenario if the confined were to be free, and he would have done either one job or another with differing wages, then in case of confinement, the culprit must forfeit the average amount of the two wages.

Torture

- No one has the right or permission to torture another individual; whether with traditional means such as whips, or with modern means such as electric shocks, etc. Needless to say for few specific cases as identified by Islamic law, pre-defined penalties are prescribed as mentioned in book of *“al-Hudoud wal Ta’zirat”.*

The penalties prescribed by Islamic law are not torture, but rulings for punishment prescribed by Islam for specific cases, implemented only when the crime has been proven in accordance with the Islamic law. This is being for the protection of the purity of society, and safeguarding its health and security.

The evidences for the illegality and prohibition of torture are numerous, and there is no difference in the prohibition of physical and psychological torture. It is not permissible to torture the criminal, and even the unbeliever, let alone the innocent.

As for the *Hudoud* – predefined penalties – and the *Ta’zirat* – penalties prescribed by a Muslim judge according to Islamic teachings – Islam prescribes them for very few cases. The execution of these penalties may only be carried out if and only if a number of conditions and criteria are met, and these criteria are such that they practically make carrying out the execution a rarity.

Furthermore, in the book of “Islamic Government”[102] the author mentioned that the Islamic judge has the permission to replace – in the case of *Ta’zir* – the whip with fine or prison sentence or any other punishment seen as fit.

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[102] Shirazi, Muhammad; *“al-Fiqh* series”, volumes 101-102.

- In Islam it is not permissible to extract a confession from a prisoner by torture. In fact there is no validity in it if the confession is taken even without torture. Also confessions made before television cameras are void too. Confessions of an accused are only valid if he is outside prison, and he confesses willingly.

Fasting and hunger strike

- In the case of the prisoner who is not sure of the beginning of the holy month of Ramadahn, he should act according to his deduction, and if that is not even probable, then he may start his month-long fast at the closest time he considers it to be correct.

- As for the prisoner who intends to go on hunger strike, it is permissible for him to do so if it does not constitute death, loss of limb, or loss of ability.



The Author

Ayatollah al-Udhma Imam Muhammad Shirazi is undoubtedly the most eminent *Marje'* or Religious Authority of Muslim world. A charismatic leader who is known for his high moral values, modesty and spirituality, Imam Shirazi is a mentor and a source of aspiration to millions of Muslims; and the means of access to authentic knowledge and teachings of Islam. He has tirelessly devoted himself, and his entire life, to the cause of Islam and Muslims in particular, and to that of mankind in general. He has made extensive contributions in various fields of learning ranging from Jurisprudence and Theology to Government, Politics, Economics, Law, Sociology and Human Rights.

Born in Najaf, Iraq, in 1347 AH, 1928 AD, the young Shirazi continued his studies of different branches of learning under the guidance of various eminent scholars and specialists, as well as his father, the renowned *Marje'* of the time, Ayatollah al-Udhma Mirza Mahdi Shirazi. In the course of his training he showed an outstanding talent and a remarkable appetite for learning as well as a tireless commitment to his work and the cause he believed in. His extraordinary ability, and effort, earned him the recognition at the age of 25, by the *Maraje'* and scholars of the time, of being a *Mujtahid,* a fully qualified religious scholar and lawmaker in the sciences of Islamic jurisprudence and law. He was subsequently able to assume the office of the *Marje'* at the early age of 33 in 1380 AH, 1961.

Imam Shirazi is distinguished for his intellectual ability and holistic vision. He has written various specialized studies that are considered

to be among the most important references in the relevant fields. He has enriched the world with his staggering contribution of more than 1000 books, treatise and studies on various branches of learning. His works range from introductory works for the youth to literary and scientific masterpieces. Deeply rooted in the Holy Qur'an and the teachings of the Prophet of Islam, his vision and theories cover such areas as Legislation, Management, Environment, Sociology, Theology, Philosophy, History Human Rights, Law and Islamic beliefs or doctrine. His work on Islamic Jurisprudence (the *al-Fiqh* series) for example constitutes 150 volumes, which run into more than 70,000 pages. Through his original thoughts and ideas he has championed the causes of issues such as the family, human rights, freedom of expression, political pluralism, non-violence, and such like.

From the outset of his adult and scholarly life, because of his total dedication to the Teachings of Islam, and because of his views on various issues, which are based on those teachings, he came under sustained pressure from the authorities in Iraq. During his stay in Iran he continued to call for Islamic issues such as freedom of expression, party political pluralism, peace and non-violence, which in turn brought about the wrath of the authorities there. His uncompromising stance on implementing the teachings of Islam in all aspects of government including such vital matters as leadership by consensus or *Showral-Foqaha'-al-Maraje'* (religious authorities' council of leadership) attracted the fury of those at the helm.

Having spent the entire of his adult life striving for the greater enlightenment of the Muslims and mankind, Imam Shirazi died in suspicious circumstances in the holy city of Qum, Iran, on Monday the 2nd Shawwal 1422 AH, 17th December 2001. More than half a million people attended his funeral procession on the following day.

Imam Shirazi believed in the fundamental and elementary nature of freedom in mankind. He used to call for freedom of expression, political plurality, debate and discussion, tolerance and forgiveness. He strongly believed in *Shura* and called for the establishment of the leadership council of religious authorities. He continuously called for the establishment of the universal Islamic government to encompass all the Muslim countries. These and other ideas are discussed in detail in his books of more than 1000.

Teachings of Islam

www.ImamShirazi.com

A site dedicated to the cause of Islam, Muslims and Mankind

Islam aims to bring about prosperity to all mankind. One of the leading authorities on Islam today, Imam Muhammad Shirazi, calls upon all Muslims to adhere to the teachings of Islam in all domains in order to regain their former glory and the salvation of mankind. These teachings include:

- PEACE in every aspect.
- NON-VIOLENCE in all conducts.
- FREEDOM of expression, belief, etc.
- PLURALISM of political parties.
- CONSULTATIVE System of Leadership.
- The re-creation of the single Muslim nation - without geographical borders, passports between them, as stated by Allah:

  "This, your community is a single community and I am your Lord; so worship Me."

- The revival of Islamic brotherhood throughout this nation:

  "The believers are brothers."

- Freedom from all the man-made laws, shackles and restrictions as stated in the Qur'an:

  "... and (the Prophet Muhammad) releases them from their heavy burdens and from the shackles that were upon them."

This is the official website of Imam Shirazi.
You can email your queries on issues of concern to the site at:
queries@ImamShirazi.com

The Arabic site for the Teachings of Islam is **www.alshirazi.com**

Other Publications by *fountain books*

1. *What is Islam? Beliefs, principles and a way of life*

Few would dare to attempt to summarize the Islamic faith in a book of this size but this is the aim of the late Grand Ayatollah Muhammad al-Shirazi, one of the most eminent Islamic authorities of modern times. Eschewing complicated jargon and deliberately using succinct and lucid language within a "question and answer" format, he has sought to convey the richness and profound spirituality of the Islamic message in all its aspects to the widest possible audience. There are necessarily some Arabic and technical terms but these have been kept to a minimum. The late Sayyid Shirazi covers all the main aspects of Islam, from the fundamental beliefs such as the Oneness of God and His justice and prophethood to topics like ablutions, praying, fasting, and making the Hajj and also deals with such diverse subjects as Islamic law, economics, politics, the Islamic view of society, the issue of freedom in Islam, and so on. This is a book which will not only be useful for Muslims who want to find out more about their religion but also for non-Muslims who seek a concise introduction to what Islam is all about.

2. *The Islamic System of Government*

In this introductory book the author outlines the basic principles of a government based on the teachings of Islam. The author begins with the aim and objectives of the government according to Islam and the extent of its authority. He then addresses, from the Islamic viewpoint, the significance and fundamental nature of such issues as consultative system of government, judicial system, freedoms, party political pluralism, social justice, human rights, foreign policy, etc. The author also outlines the policies of a government on issues such as education, welfare, health, crime, services, etc. as well as such matters as the government's income, and authority.

3. *The Family*

In this book the author highlights the problems he sees primarily in Islamic societies and particularly in the west today, from the phenomenon of unmarried young men and women through to birth control and contraception. He surveys the idea of marriage in various religions and schools of thought and discusses polygamy from the Islamic perspective. As well as being a call to the Muslim world to revert to the true teachings

of Islam, this book can also be of use as an introduction to others who seek some answers to the social problems of today. This is because Islam has detailed teachings, which promise success in every area of human life on individual and societal levels, and what's more their practicality has been historically proven.

4. *If Islam were to be established*

This book can serve as the Muslim's guide to the Islamic government. If an Islamist opposition group has a plan for an Islamic government, this book would help to check various aspects of the plan. In the absence of such a plan, this book would present one. To the non-Muslims, the book presents a glimpse of a typical Islamic system of government. The book would also serve as a yardstick for anyone to check the practices of any government that claims to have implemented an Islamic system of government.

5. *The Qur'an: When was it compiled?*

In this book the author addresses the issues of when the Holy Qur'an was compiled, on what and whose instructions was this task carried out and who accomplished its compilation in the form that it is available today. In this work the author presents undisputable evidence as to address these crucial questions. Through historical, methodical and logical analyses, the author establishes how and when the compilation of the Holy Qur'an was achieved. In the latter half of the book the author cites many Prophetic traditions on the significance of the learning and recitation of Holy Qur'an. It is a must read for every Muslim, and any non-Muslim who follows Islamic issues.

6. *War, Peace, and Non-Violence: An Islamic perspective*

In this work the author addresses three controversial issues, which have come to be associated with Islam. Through his extensive knowledge of the teachings of Islam, the author presents the Islamic stand on war, peace and non-violence, as found in the traditions and teachings of the Prophet of Islam, which could serve as exemplary models for the Mankind. Detailed accounts of the traditions of Prophet in his dealings with his foes during war or peace times are presented in this book, which gives the reader a clear insight into the way and the basis upon which the Prophet of Islam used to conduct his affairs in this respect.

7. Fundamentals of Islam

In this book the author outlines the five fundamental principles of Islam, namely the Indivisible Oneness of God *(Tawheed),* Divine Justice *(Adl),* Prophethood *(Nubowwah),* Leadership of mankind *(Imamah),* and Resurrection *(Me'ad).* For each principle, the author presents a concise discussion on the significance of the issue concerned. The book could serve as a good introduction to fundamental Islamic beliefs, both for the Muslim and non-Muslim alike.

8. Islamic Beliefs for All

In this book the author discusses the five fundamental principles of Islam. These principles are *Tawheed* or the Indivisible Oneness of God, *Adl* or Divine Justice, Prophethood, *Imamah* or the Leadership of mankind after the prophet, and Resurrection. What distinguish this book are the author's subtle approach in addressing the issues concerned and the simple examples given to illustrate the discussion. This authoritative work is not only important to Muslims, but it would also be of interest to those non-Muslims who seek to explore Islam and its doctrine. This easy to read book would be a valuable reference for Religious Education.

9. The Bible and Christianity: an Islamic view

In this work the author carries out a brief investigation into the Bible and presents his findings. They show that some of the most noble men, i.e. the Prophets, who have been chosen by God Almighty as His messengers to mankind, are accused in the Bible to have committed some of the most vile and immoral conducts known to man. Prophets are accused of deception, lying, fornication, rape, incest, murder, and the list goes on. Even God does not escape unscathed in the Bible . . . false characteristics are attributed to Him, or He is accused of making His messengers to commit foul and disgusting acts.

In the second part of this work the author presents some of the debates he had with the Christians who visited him in his residence in Karbala, Iraq. The debates concerned their impression of Islam and its doctrine as well as their own religious beliefs. In this presentation the author shows how he invited non-Muslims to Islam through calm but rational and intellectual debates with them. The book makes an interesting read, especially when the reader can see the simple arguments put forward in these debates.

10. Imam Husayn - The Sacrifice for Mankind

This is a collection of articles about a totally unique individual who, through his remarkable sacrifices, managed to change the course of history and the direction that mankind was heading for. He is none other than Imam Hussain, the grandson of the Prophet of Islam, Muhammad, and the second son of Fatima and Ali, peace be upon them. Imam Hussain *alayhis-salam* stood up to tyranny and oppression and gave everything he had, including his life and the lives of his most beloved sons and brothers as well as those of his closest allies, in order to awaken the masses, reform society and rectify the distortion that has been inflicted on Islam.

The articles in this work cover some aspects of the aims and objectives of Imam Hussein's movement, the difference between his strategy and that of his brother Imam Hassan in facing tyranny and despotism, the examples he set, and the lessons that are learnt from the events that lead up to Karbala fourteen centuries ago. Besides the benefits of his movement, the personality of Imam Hussain *alayhis-salam* as reflected by the many hadith and teachings of Prophet Muhammad is also discussed. Also included in this work are a number of questions and answers about the commemoration ceremonies observed by the Muslims around the world, and on the validity of some of the practices on the occasion of Ashura.

11. Aspects of the Political Theory of Imam Muhammad Shirazi

Muhammad Ayub is a well-known Islamist political activist within the Iraqi circle who has established a long history of political struggle behind him. He was attracted by the views of the Imam Muhammad Shirazi in the fields of social and political sciences. This prompted the author to write this book to introduce the reader to these views that have remained relatively unknown to the Muslim activists and reformists. It covers such aspects on politics as freedom of expression, party-political pluralism and organization, social justice, peace and non-violence, human rights, consultation system of government, etc.